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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1438

DANIEL CECERE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 71-1568

ANGELO DECARLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals sitting *en banc* (Pet. No. 71-1438 App., pp. 23a-53a) are re-

ported at 458 F. 2d 358. The panel opinion of the court of appeals (Pet. No. 71-1438 App., pp. 7a-20a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1972. The petition for a writ of certiorari in No. 71-1438 was filed on May 4, 1972. On April 28, 1972, Mr. Justice Brennan extended the time within which to file a petition for certiorari in No. 71-1568 to and including June 3, 1972, and the petition was filed on June 1, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to admit into evidence a letter written by the deceased extortion victim, and other oral statements made by him before his death, where the jury was instructed to consider the evidence only for the purpose of determining the victim's state of mind.

2. Whether prejudicial error resulted because the government was permitted to introduce evidence as to the cause of death of the extortion victim.

3. Whether the indictment provided petitioner Cecere with sufficient notice of the crime charged.

4. Whether the conduct of the prosecutor or the trial judge deprived petitioner DeCarlo of a fair trial.

STATEMENT

A six-count indictment returned in the United States District Court for the District of New Jersey

charged petitioners and two others with conspiracies and substantive violations of 18 U.S.C. 892, and 2 (see Pet. No. 71-1438 App. B). The charges related to the making of an extortionate extension of credit to one Louis Saperstein, participation in the use of extortionate means to collect and attempt to collect payments from Saperstein, and participation in the use of extortionate means to punish Saperstein for non-payment.[1] Petitioners were convicted by a jury on all six counts; each was sentenced to a prison term totalling twelve years and was fined $20,000 (JA 913a-917a). A panel of the court of appeals reversed. On rehearing *en banc*, the convictions were affirmed by the full court, two judges dissenting (Pet. No. 71-1438 App., pp. 23a-53a).

1. The evidence, which is detailed in the majority opinion below (Pet. No. 71-1438 App., pp. 24a-27a), showed that, in the late summer of 1967, Gerald Zelmanowitz, who was a securities analyst engaged in arbitrage[2] and the chief government witness at

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[1] The indictment appears on page 12a of the multi-volumed joint appendix (hereinafter JA); a copy of the appendix is being filed herewith. We are also lodging with the Clerk of this Court a copy of the court of appeals' supplemental appendix (SA).

[2] As practiced by Zelmanowitz, arbitrage involved the purchase in Europe of large amounts of foreign-held securities and the simultaneous sale of them in the United States where the high volume of trading on the New York Stock Exchange gave the securities a higher price (JA 101a-102a). A profit could be made only as long as Zelmanowitz avoided an 18% United States tax on the transactions, and for this it was necessary to obtain certain equalization tax forms from the

trial, persuaded Louis Saperstein to invest $50,000 in the arbitrage operation (JA 101a-106a). Enthusiastic over potential earnings, Saperstein suggested that they visit petitioner DeCarlo to procure a $100,000 loan as additional capital (JA 113a-116a). DeCarlo referred them to petitioner Cecere (JA 116a-117a) who declined to make the loan; instead he offered to invest $100,000 on behalf of DeCarlo, co-defendant Joseph Polverino and himself, and to recall and transfer to the operation a $50,000 loan that the three men had earlier made to Saperstein (JA 171a). In exchange for this investment of $150,000, it was agreed that DeCarlo, Cecere and Polverino would receive 50 percent of the profits from the arbitrage business (JA 172a). Saperstein, who remained some $200,000 in debt to petitioners and their associates and who faced heavy weekly "vigorish" (interest) payments (JA 192a),[3] secretly withheld $55,000 of the $150,000 designated for the arbitrage account (JA 252a-253a).

In sixteen days of trading through December 1967, Zelmanowitz made $85,000 in profits for the investors (JA 186a). He was forced to stop his dealings at the end of December 1967, however, because the Internal Revenue Service refused to issue equalization tax forms and his accounts in New York and Switzer-

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Internal Revenue Service (JA 197a). The illegality of the arbitrage operation arose from the need to supply the IRS with false information in order to obtain the forms (SA 54).

[3] Interest on the $50,000 debt alone had come to $800 per week (JA 172a).

land were frozen (JA 197a-198a). In early January 1968, Saperstein told Zelmanowitz that he had fallen behind in his loan payments, that he greatly feared for his life and that he desperately needed funds from the arbitrage account. Zelmanowitz, whose Swiss account had by then been temporarily cleared, permitted him to withdraw $40,000 from that account (JA 222a).[4]

On numerous occasions during the summer of 1968, Saperstein begged Zelmanowitz to lend him money to make interest payments to petitioners and their associates. Threatened with physical harm if he did not make his payments, Saperstein would call Zelmanowitz again and again, "constantly afraid, constantly in despair, constantly in need of money" (JA 254a, 248a-254a). In September 1968, Saperstein briefly went into hiding in New York, apparently out of great fear for himself and his family (JA 257a, 260a). At a meeting on September 13, 1968, arranged to discuss payment of the large sum of money he owed, Saperstein pleaded with petitioner Cecere not to harm him; he offered to commit suicide after taking out a $100,000 life insurance policy naming Cecere as beneficiary if Cecere promised not to harm his family (JA 267a-269a). That same day, Cecere and an aide named "Lenny" drove Saperstein

[4] The New York and Swiss accounts were frozen and unfrozen on several occasions during 1968 (JA 351a). In April 1968, $130,000 of the $133,000 in the Swiss account was withdrawn and deposited in another bank in petitioner Cecere's name (JA 242a-245a). In September 1968, the rest of the money was withdrawn and given to Cecere (JA 276a-279a).

to a place in New Jersey owned by DeCarlo. There Cecere and Polverino savagely beat and kicked Saperstein until he was bloody and unconscious (JA 270a-271a). According to Zelmanowitz, who witnessed the beating, Saperstein looked as though he were dead (JA 270a). DeCarlo entered the room and told Cecere and Polverino to stop beating Saperstein (JA 271a-273a). Saperstein was then taken outside, where DeCarlo told him that if he did not pay $5,000 a week from then on and did not pay the entire sum owed by December 13, 1968, he would be killed (JA 273a-275a).

From this point until his death by acute arsenic poisoning on November 26, 1968, Saperstein lived in fear. Petitioner DeCarlo refused to extend the December 13 deadline, and Saperstein was frequently in a state of depression and deep despair (JA 296a, 394a-395a, 423a).

2. On November 25, 1968, Saperstein mailed to the Federal Bureau of Investigation a letter which he had written. The following portion of that letter was introduced at trial, after the judge had repeatedly given cautionary instructions that its contents could not be considered for the truth of the statements made but could be considered only on the issue of Saperstein's state of mind (JA 574a, 806a-814a):[5]

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[5] Each member of the jury was required to sign an "interrogatory" to the effect that, in arriving at his verdict, the juror had considered the letter, and any other statement of Saperstein's made out of the presence of a defendant, "*only* for the purpose of a determination of [Saperstein's] state of

Federal Bureau of Investigation, Newark, New Jersey.

Gentlemen: I am writing you, maybe others can be helped by my plight. On September 13, 1968 I was severely beaten at a place in the rear of Weiland's Restaurant, Route 22, DeCarlo's headquarters. I was then told and given 3 months until December 13, 1968 to pay the entire accumulated amount under threat of death. Cecere, DeCarlo and Polverino, also stated many times my wife and son would be maimed or killed. Please protect my family—I am sure they mean to carry out this threat.

Last night from my home I called DeCarlo and pleaded for time but to no avail. Over the phone DeCarlo stated unless further monies was [*sic*] paid the threats would be carried out.

Louis B. Saperstein

At the outset of the trial it was stipulated that Saperstein had died on November 26, 1968 (JA 293a-295a). At trial, the county medical examiner who performed an autopsy on Saperstein's body testified that Saperstein died of acute arsenic poisoning (JA 423a), but there was no evidence indicating how the arsenic was administered.

The defense placed two witnesses on the stand. One testified that on November 22, 1968, Saperstein expressed the belief he was suffering from cancer

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mind at the time he made the statements" (See JA 817-818a; Pet. No. 71-1568 App., pp. 1a; 8a, 22a).

(JA 583a-584a). The other claimed to have overheard Saperstein say on the day before his death that someone had sprinkled "some silver stuff" on his food at lunch that day (JA 593a-595a).

ARGUMENT

1*a*. Petitioner Cecere contends that the Saperstein letter, and certain oral statements that were made by Saperstein before his death, were admitted into evidence in violation of the confrontation clause of the Sixth Amendment and of the due process clause of the Fifth Amendment. The claim is essentially that, despite the trial court's repeated admonitions to the jury to consider the contested letter and statements only insofar as they bear on Saperstein's state of mind, the jury improperly disregarded the instructions to this effect and considered the evidence for the truth of the statements made. This argument was unanimously rejected by the full court below. We agree with the court of appeals that there is no reason to assume that the jurors did anything other than what they said they did, *i.e.*, considered the challenged evidence "*only* for the purpose of a determination of [Saperstein's] state of mind * * *" (n. 5, *supra*).

Moreover, as part of its case, the government was required to show that Saperstein feared that nonpayment of the loans would be met by violence or other criminal means (see 18 U.S.C. 894(b)); thus it was for this wholly legitimate purpose that the

questioned letter and statements were admitted.[6] In these circumstances, there is no basis for petitioner's reliance on *Bruton* v. *United States*, 391 U.S. 123, or *Dutton* v. *Evans*, 400 U.S. 74.

Bruton involved the admission at a joint trial of the defendant's out-of-court confession which implicated the other defendant; the confession was concededly inadmissible against the one who had made the statement. In reversing, this Court was careful to point out that no recognized exception to the hearsay rule was there involved, and that its decision intimated "no view whatever that such exceptions necessarily raise questions under the Confrontation Clause" (391 U.S. at 128 n. 3). It held that "in the context of a joint trial [it could not] accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination" (*id.* at 137). In contrast, the Saperstein letter and statements at issue here were admissible against each defendant on the crucial issue of the victim's state

[6] Petitioner erroneously argues (Pet. No. 71-1438, pp. 18-20) that, since Saperstein was unavailable, evidence of his state of mind was not admissible in that it was not "direct evidence" within the intendment of 18 U.S.C. 894(c). The short answer is that statements of Saperstein showing his state of mind did constitute direct admissible evidence. See *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285, 295-296; 6 Wigmore, *Evidence* § 1714 (3d ed. 1940). Nor is there any indication whatever in the legislative scheme that Congress intended, as petitioners suggest, to limit proof of the victim's state of mind to evidence of the reputation of the lender where the actual testimony of the victim might be unavailable (see Pet. No. 71-1438 App., pp. 14a-15a, n. 3).

of mind, and, as such, were not hearsay evidence.[7] Any possible prejudice—and we think there was none—was plainly outweighed by the letter's great relevance to a key issue in the case. Under the court's careful instructions, the evidence was thus properly admitted.

Nor is anything to the contrary suggested by this Court's decision in *Dutton* v. *Evans*, *supra*, 400 U.S. at 87-89, upholding against a challenge based on the confrontation clause the validity of a Georgia statute providing that a statement made in the concealment stage of a conspiracy may be admitted for the truth of the matter asserted therein. As already noted, the Saperstein letter and statements were introduced, not for the truth of the specific matters asserted therein, but solely to show that the extortion victim was in a state of great fear because of his inability to make payments to petitioner and his associates. *Dutton* thus has no application here.

Petitioner Cecere also asserts that this evidence should have been excluded because as a matter of federal evidentiary law it could only have been used to corroborate testimony that had been given at trial by the victim himself (Pet. No. 71-1438, pp. 16-18). This alleged rule of federal practice is not sup-

[7] As the majority below pointed out, "[r]ather than proving the truth of the matters asserted, the letter was admitted to prove Saperstein's state of mind. The Saperstein letter, thus, was not hearsay in the context of its admission, and, the Sixth Amendment was in no way infringed" (Pet. No. 71-1438 App., pp. 31a-32a, n. 5). See *Dutton* v. *Evans*, *supra*, 400 U.S. at 88.

ported by the cases on which petitioner relies (Pet. No. 71-1438, p. 17). Contrary to petitioner's claim, the Second Circuit in *United States* v. *Kennedy*, 291 F. 2d 457, did not conclude that out-of-court statements by the victim should be admitted only if the victim also testifies. It was there held that proof of the state of mind of the victim is "relevant, indeed essential, to a prosecution for extortion" and "may be evidenced by the victim's own testimony at the trial * * * or, pursuant to a recognized exception to the hearsay rule * * * by statements made by him to others" (291 F. 2d at 458). This view is wholly consistent with the trial court's ruling in the present case.

b. Petitioner DeCarlo argues that, by requesting each member of the jury to sign a form confirming that he had considered the Saperstein letter and statements only for the purpose of determining the victim's state of mind, the court imposed improper pressure on the jurors resulting in a denial of due process. He urges that his conviction should be set aside under the principles of *United States* v. *Spock*, 416 F. 2d 165 (C.A. 1). But, since no objection was made at trial to the use of the form,* petitioner is now in no position to complain on the ground of undue judicial pressure. *See United States* v. *Spock*, *supra*, 416 F. 2d at 182-183. In any event, his point is not well taken.

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* DeCarlo's counsel made the suggestion, ultimately followed by the trial judge, that 12 juror forms rather than one be used (JA 772a-773a).

Unlike the situation in *Spock*, the jury in this case was not directed to return special findings as to the defendant's guilt. In *Spock*, the court of appeals found that such a requirement raised the real danger of judicial pressure on the jury to return a verdict of guilty: "There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step." *United States* v. *Spock*, *supra*, 416 F. 2d at 182. But the form at issue here was not used for the purpose of making or recording any findings. It was used simply as an aspect of the judge's instructions, and was distributed to the jurors for their signatures in an effort to keep the instructions uppermost in their minds and to assure that each would comply with his duty "to apply the law as interpreted by the court * * *." *United States* v. *Boardman*, 419 F. 2d 110, 116 (C.A. 1), certiorari denied, 397 U.S. 991.

2. Petitioner Cecere contends that it was prejudicial error for the trial court to admit testimony regarding the cause of Saperstein's death. This argument was fully considered and properly rejected by the majority below, in an opinion on which we rely here (Pet. No. 71-1438 App., pp. 35a-44a). See also the concurring opinion of Chief Judge Seitz (Pet. No. 71-1438 App., pp. 44a-45a).[9]

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[9] Petitioner DeCarlo's claim that the prosecutor overstepped legitimate bounds by introducing this evidence is but a variant of his attack on the admissibility of the evidence generally. If, as the majority below held, the evidence could properly be admitted, the prosecutor cannot be faulted for introducing it.

3. Petitioner Cecere's challenge (Pet. No. 71-1438, pp. 22-26) to the indictment (JA 12a-16a) is insubstantial. It is settled that an indictment is adequate if it informs the accused of the charge against him with sufficient precision to enable him to prepare his defense, avoid surprise, and plead his acquittal or conviction in bar of any further prosecution for the same offense. *Russell* v. *United States*, 369 U.S. 749, 763-764; *United States* v. *Debrow*, 346 U.S. 374. The indictment in the instant case satisfied this standard; and it plainly met the requirements of Rule 7(c), Fed.R.Crim.P. Each count charged only one offense, made reference to the appropriate statutory provisions, and included the essential facts constituting the offense charged.

Petitioner's claim of prejudice is imprecise. He does not indicate how he was prejudiced by the refusal to grant a bill of particulars. Nor is there any showing how undue surprise could have resulted from the fact that the statutory definitions created alternative possibilities for defining the terms "extension of credit" and "extortionate extension of credit." And petitioner has not indicated any way in which the present indictment hindered him in preparing his defense, or placed him in danger of a second prosecution for the same offense.

4. Finally, petitioner DeCarlo alleges that both government counsel and the trial court directed personal attacks against defense counsel during the trial, and that the trial court committed prejudicial error by releasing during the trial certain overhearings of

DeCarlo, thereby purportedly causing an "avalanche of publicity" (Pet. No. 71-1568, p. 19). These issues were not raised below and pose "no exceptional circumstances" warranting review by this Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16. In any event, they are essentially without substance.

To support his claim that defense counsel was verbally attacked by the court and by government counsel, petitioner simply recites a number of record references (Pet. No. 71-1568, p. 19). An examination of these references, however, reveals that all of the challenged remarks occurred outside the presence of the jury, and they hardly evince the "hostility" attributed to them by petitioner. Indeed, most, if not all, of the incidents referred to deal with other counsel, and, in the context of this hard fought and lengthy trial, do not support a claim of prejudice.

The claim that the release by the court at the outset of the trial of illegal surveillance records prompted such extensive publicity as to deny petitioner a fair trial is not well taken. The jury was sequestered during the entire trial, with no access to radio or newspapers. There is no suggestion that this publicity was in any way brought to the attention of the jury or that it had any influence on the verdict.[10]

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[10] Petitioner's reliance on *Pamplin* v. *Mason*, 361 F. 2d 1 (C.A. 5), is misplaced since there the alleged community prejudice existed well before the jury was chosen.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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